lead ordinary prudence and caution; that the statute is intended to protect the weak and credulous as well as the careful and intelligent, and since the materiality and influence of the pretence is for the jury to determine from the evidence (*Thomas* v. *People* (1866) 34 N. Y. 351) the pretences must be such only as are calculated to deceive, leaving that to be determined from the circumstances of each particular case. This is the established New York rule and has been questioned in but two cases (*The People* v. *Williams* (1842) 4 Hill, 9, and *The People* v. *Stetson* (1848) 4 Barb. 51), which held to the ordinary care and prudence rule where the fraud arose out of a transaction unlawful in itself and in which the complainant participated. These cases, so far as they are in conflict with the general rule, have been expressly overruled by those first above cited. The charge, therefore, to the jury in the first of the principal cases is correct under the New York statute, and is in accord with the interpretation put upon it by the courts.

Delaware has also enacted a statute against false pretences (Rev. Code, p. 967) modeled upon 30 Geo. II, c. 24, and were it not for the fact that the old common-law offence of cheating by false tokens, as defined in the statute of 33 Hen. VIII, c. 1, is retained in that State (Rev. Code, Del. (1874) c. 132, sec. 6), it seems that the instruction to the jury in the second of the principal cases must have been error. This conclusion is fortified by the case of *State* v. *Lynn*, (Del. 1901) 51 Atl. 878, where the same judge, (LORE, Ch. J.), in the same court, one month later, lays down the broad general definition quoted from that case above, without any mention of the ordinary care and prudence rule, and the rule there laid down (q. v.) would seem to be broad enough to include such a case as the one under discussion, *i. e.*, a cheat or fraud by privy token.

The charge to the jury in the Delaware case, stating the common law rule, may be accounted for by the fact that the statute created a new offence. It included the old, it is true, but the latter is saved by the statute providing that cheating shall be a misdemeanor.

LIABILITY OF MASTER FOR WILLFUL AND WANTON ACTS OF SERVANT. —The Supreme Court of Wisconsin, in the recent case of *Euttng* v. *Chicago & N. W. R'y. Co.* (1902) 92 N. W. 358, has held that a railroad corporation must respond in damages for injuries inflicted upon a child as a result of an engineer's wantonly placing a torpedo upon the track and running over it with the object of frightening the child. The court places the master's liability on the ground that the scope of the servant's employment included the safe custody of the explosives.

The liability of a master for acts of his servant seems originally to have been limited strictly to acts in execution of the master's will: *Southern* v. *How* (1618) Cro. Jac. 468; *Kingston* v. *Booth*, (1685) Skinner, 228. The doctrine of implied authority makes its appearance in *Turberville* v. *Stamp* (1697) Ld. Raymond 264. The distinction between a master's liability for negligence and for willful or wanton acts of his servant seems to rest on slight authority. *Middleton* v. *Fowler* (1698) Salkeld 282, simply says that no master is

chargeable with his servant's acts save when they are authorized, which would exclude negligent as well as willful acts. A reporter's note to *Jones* v. *Hart* (1698) Salkeld 441, appears to contain the first positive enunciation of the rule. A hundred years later, in refusing either case or trespass as a remedy against the master for a willful injury, the courts denied, *obiter*, the substantive right: *Savignacy* v. *Roome* (1794) 6 T. R. 125; *McManus* v. *Crickett* (1798) 1 East 106.

The *dicta* of *McManus* v. *Crickett* were followed in England and America for a time: *Lyons* v. *Martin* (1838) 7 L. J. Q. B. 214; *Wright* v. *Wilcox*, (1838), 19 Wend. 343. The present rule in England is, however, as follows: The master is liable for all torts of the servant, whether negligent or willful, even if expressly forbidden, if committed within the general scope of the servant's employment and for the master's benefit: *Greenwood* v. *Seymour* (1861) 7 H. & N. 355; *Ward* v. *General Omnibus Company*, (1873) 42 L. J. Exch., 265. The rule has been laid down in many American jurisdictions accordingly: *Hoffman* v. *New York Central Railway* (1881), 87 N. Y. 25; *Levi* v. *Brooks* (1877) 121 Mass. 501; *I. & G. N. Ry. Co.* v. *Cooper*, (1895) 88 Texas 607. The rule thus laid down rests the liability upon the servant's intention in acting. If the tort is committed with a view to the master's benefit, then, express commands to the contrary notwithstanding, the master is liable. In the language of *Turberville* v. *Stamp* (*supra*), "it shall be intended that the servant had authority, the act being for the master's benefit." That is, the liability rests upon the fiction of an implied command, which the master is not permitted to deny.

A line of American decisions refuses to limit the master's liability to willful acts done for his benefit, where the servant is entrusted with agencies which may probably become means of injury to third persons. *T., W. & W. R. R.* v. *Harmon* (1868), 47 Ill. 298; *Regan* v. *Reed* (1901) 96 Ill. App. 460; *Railway Co.* v. *Shields* (1890) 47 Ohio St. 387; *Texas & Pac. R. R.* v. *Scoville*, (1894) 62 Fed. 730; *Alsever* v. *Railroad Co.*, (Iowa 1902) 88 N. W. 841, agree with the principal case on this point. The theory of these cases seems to be that the scope of an employment involving the use of dangerous agencies includes a duty of safe custody, and that even a willful perversion of such agencies by the servant, in sport or malice, to his own end, is not a sufficient departure from the scope of the employment to excuse the master. Cf. *Dixon* v. *Bell*, (1816) 5 M. & S. 198.